

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 29, 2008

ADRIAN WILKERSON v. HOWARD CARLTON, WARDEN

**Direct Appeal from the Criminal Court for Johnson County
No. 5129 Robert E. Cupp, Judge**

No. E2007-02453-CCA-R3-HC - Filed November 20, 2008

Petitioner, Adrian Wilkerson, was convicted of first degree murder, especially aggravated robbery, and theft over \$1,000. Petitioner subsequently filed a petition for writ of habeas corpus relief alleging that no judgments of conviction had been entered for the offenses of especially aggravated robbery and theft. In response to the habeas corpus petition, the State attached copies of the judgments of convictions for these offenses to its motion to dismiss. The trial court summarily dismissed the habeas corpus petition, and it directed that Petitioner's judgments of convictions be forwarded to the Davidson County Criminal Court, the convicting court, to address certain errors in the judgments pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure. On appeal, Petitioner argues that the trial court erred in summarily dismissing his habeas corpus petition without an evidentiary hearing and that a writ for habeas corpus relief, not Rule 36, was the proper remedy for addressing the errors in his judgments of conviction. After a thorough review, we affirm the judgment of the trial court and conclude that the trial court properly forwarded copies of Petitioner's judgments of conviction for especially aggravated robbery and theft to the convicting court for entry of corrected judgments, as set forth in this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ALAN E. GLENN, J., joined.

Adrian Wilkerson, Mountain City, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General, and Tony Clark, District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Following a jury trial, Petitioner was convicted of especially aggravated robbery, first degree murder, and theft over \$1,000.00. Petitioner was sentenced to life imprisonment for his first degree murder conviction. Following a sentencing hearing, the trial court sentenced Petitioner as a Range I, standard offender, to twenty-five years for the especially aggravated robbery conviction and four years for the theft conviction. State v. Adrian Wilkerson, No. 01C01-9610-CR-00419, 1998 WL 538551, at *1 (Tenn. Crim. App., at Nashville, Aug. 26, 1998), perm. to appeal denied (Tenn. Sept. 18, 2000). Petitioner was ordered to serve his sentences consecutively, for an effective sentence of life plus twenty-nine years. Id. Petitioner's convictions were upheld on appeal, but a panel of this Court modified Petitioner's especially aggravated robbery sentence to twenty-one years. Id., 1998 WL 538551, at *15.

In his first pro se habeas corpus petition, Petitioner alleged that the trial court erred by failing to instruct the jury on lesser included offenses and that he received the ineffective assistance of counsel at trial. The trial court's summary dismissal of the petition was affirmed on appeal by memorandum opinion pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Adrian Wilkerson v. State, No. M2003-01385-CCA-R3-HC, 2004 WL 2599458 (Tenn. Crim. App., at Nashville, Nov. 12, 2004), perm. to appeal denied (Tenn. Feb. 28, 2005).

In his second pro se habeas corpus petition, which is the subject of this appeal, Petitioner alleged that the trial court failed to enter judgments of conviction for his especially aggravated robbery and theft convictions, and that his sentences for these offenses are therefore illegal and void. The State filed a motion to dismiss, and attached copies of two judgments entered by the Davidson County Criminal Court on May 2, 1996, reflecting Petitioner's convictions of especially aggravated robbery and theft over \$1,000.

In his response to the State's motion to dismiss, Petitioner pointed out that his judgment of conviction for especially aggravated robbery, a Class A felony, reflected a sentence of four years, and his judgment of conviction for theft, a Class D felony, reflected a sentence of twenty-five years. See T.C.A. § 40-35-112(a)(1) (providing that a Range I, standard offender, convicted of a Class A felony is subject to a sentence of between fifteen and twenty-five years); § 40-35-112(a)(4) (providing that a Range I, standard offender, convicted of a Class D felony is subject to a sentence of between two and four years). Petitioner submitted that these errors demonstrated "that both documents appear[ed] to have been manufactured for the sole purpose of this litigation."

The State filed an amended motion to dismiss in which it acknowledged the errors on the face of Petitioner's judgments of conviction. The State argued, however, that it was clear that the sentence lengths for the two convictions had merely been transposed and were thus clerical errors subject to correction by the trial court. In addition, the State contended that Petitioner's habeas corpus petition should be dismissed for failure to comply with the mandatory procedural

requirements because Petitioner stated in his habeas corpus petition that this was his first petition for habeas corpus relief when in fact it was his second. See T.C.A. § 29-21-107(b)(4).

Thereafter, Petitioner filed a motion to amend his habeas corpus petition to cure the procedural deficiencies and attached a copy of his first habeas corpus petition. Petitioner contended that he had mistakenly construed the statute to require inclusion of only those prior habeas corpus petitions which raised the same issues as the instant petition. The record does not indicate that the trial court acted on Petitioner's motion.

The trial court dismissed the habeas corpus petition without an evidentiary hearing and without the appointment of counsel, finding that Petitioner had failed to state a claim for which habeas corpus relief was available and that the procedural requirements for filing a habeas corpus petition "were not scrupulously followed." By its order, the trial court thus implicitly denied Petitioner's motion to amend his habeas corpus petition. The trial court found that the length of sentences reflected on the judgments were clerical errors subject to correction pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure. In addition, the trial court observed that the Davidson County Criminal Court, the convicting court, had not yet entered an amended judgment for Petitioner's especially aggravated robbery conviction to reflect a sentence of twenty-one years in accordance with this Court's opinion on direct appeal. See Adrian Wilkerson, 1998 WL 538551, at *15. The trial court directed that copies of Petitioner's judgments of conviction be forwarded to the Davidson County criminal court.

II. Standard of Review

The right to habeas corpus relief is available "only when 'it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered' that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007) (quoting Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993)). In contrast to a post-conviction petition, a habeas corpus petition is used to challenge void and not merely voidable judgments. Summers, 212 S.W.3d at 255-56. A voidable judgment is one that is facially valid and requires proof beyond the face of the record or judgment to establish its invalidity. Id. at 256; Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998). "A void judgment is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment." Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999) (quoting Dykes, 978 S.W.2d at 529).

A petitioner bears the burden of proving a void judgment or illegal confinement by a preponderance of the evidence. Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000). A trial court may summarily dismiss a petition for writ of habeas corpus relief without the appointment of counsel and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. See Summers, 212 S.W.3d at 260; Hickman v. State, 153 S.W.3d 16, 21 (Tenn. 2004).

The procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. Summers, 212 S.W.3d at 260; Hickman, 153 S.W.3d at 19-20; Archer, 851 S.W.2d at 165. The formal requirements for an application or petition for writ of habeas corpus relief include a requirement that the petitioner state whether “it is [the] first application for the writ, or, if a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons [should be] given for the failure so to do.” T.C.A. § 29-21-107(b)(4). “A habeas corpus court may properly choose to dismiss a petition for failing to comply with the statutory procedural requirements. . . .” Summers, 212 S.W.3d at 260; Hickman, 153 S.W.3d at 21.

The determination of whether habeas corpus relief should be granted is a question of law. Summers, 212 S.W.3d at 255; Hart v. State, 21 S.W.3d 901, 903 (Tenn. 2000). “Therefore, our review is de novo with no presumption of correctness given to the findings and conclusions of the lower court.” Summers, 212 S.W.3d at 255; State v. Livingston, 197 S.W.3d 710, 712 (Tenn. 2006).

III. Analysis

On appeal, Petitioner reiterates his allegation that no judgments of conviction for especially aggravated robbery and theft were ever entered by the trial court, and that the judgments presented by the State to the trial court were “manufactured.” Petitioner contends that as a result, the trial court lacked jurisdiction to sentence him for these offenses.

According to Petitioner’s response to the State’s motion to dismiss his habeas corpus petition, neither the Tennessee Department of Correction nor Petitioner’s retained counsel was apparently able to secure copies of these judgments prior to the filing of the petition. Attached to the State’s motion to dismiss, however, was an affidavit from the prosecutor which stated in pertinent part:

2. After reviewing the petitioner’s claim that no judgment order existed for the especially aggravated robbery and theft convictions, a member of our support staff, Dawn Tignor, contacted Tom Blackwell at the Clerk’s Office.
3. The Clerk faxed the attached copies of the judgment orders in case 95-B-856 entered on May 2, 1996 to this office on August 14, 2007.

Based on the production of judgments of convictions, we conclude that the trial court did not err in summarily dismissing Petitioner’s habeas corpus petition for failure to state a claim which is cognizable in a habeas corpus forum.

Petitioner contends that the trial court erred in not granting his motion to amend in order to bring his habeas corpus petition into compliance with the mandatory procedural requirements. “Whether a petitioner in a habeas corpus proceeding should be permitted to amend his petition is a matter which addresses itself to the sound discretion of the trial court.” Howard Buchanan v. Tony

Parker, Warden, No. W2004-01386-CCA-R3-HC, 2005 WL 39253, at *6 (Tenn. Crim. App., at Jackson, Jan. 6, 2005), perm. to appeal denied (Tenn. May 23, 2005) (citing Paul G. Hull v. State, No. 02C01-9605-CC-00183, 1997 WL 346215, at *2 (Tenn. Crim. App., at Jackson, June 24, 1997), no perm. to appeal filed (holding that a trial court did not abuse its discretion by denying a petitioner's motion to amend his habeas corpus petition) (citing Milton Holt v. State, No. 01C01-9110-CC-00321, 1992 WL 127406 (Tenn. Crim. App., at Nashville, June 12, 1992), perm. to appeal denied (Tenn. Sept. 14, 1992)). “This Court will not interfere with the exercise of this discretion unless it appears on the face of the record that it has been abused.” Howard Buchanan, 2005 WL 39253, at *6.

In this instance, we conclude that the trial court did not abuse its discretion when it implicitly denied Petitioner’s motion to amend because, regardless of procedural deficiencies, Petitioner’s habeas corpus petition failed to state a claim for which habeas corpus relief is available.

Nonetheless, after copies of the judgments were obtained, the trial court, the State, and apparently Petitioner noticed for the first time that the length of his sentences for especially aggravated robbery and theft had been transposed. That is, the judgment form for count one, case no. 95-B-856, states that Petitioner, a Range I, standard offender, is convicted of especially aggravated robbery, a Class A felony, and sentenced to four years’ confinement. The judgment form for count three, case no. 95-B-856, states that Petitioner is convicted of theft of property valued over \$1,000, a Class D felony, and sentenced to twenty-five years. See T.C.A. §§ 40-35-112(a)(1) and 40-35-112(a)(4). The trial court also observed that the Davidson County criminal court had not yet entered an amended judgment to reflect the modification of Petitioner’s sentence for especially aggravated robbery following his direct appeal. The trial court found,

[t]his is what this case is about, it is simply a clerical mistake in the judgments arising from an oversight or omission and can be corrected at any time In closing, this court will forward copies of these documents to the Honorable Randall J. Wyatt, Jr., Criminal Court Judge, for Davidson County for his consideration of the aggravated robbery judgment, as well as the theft judgment.

Petitioner asserts that the discrepancies reflected on the judgment forms may not be corrected pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure, citing State v. Burkhardt, 566 S.W.2d 871 (Tenn. 1978), State v. Bouchard, 563 S.W.2d 561 (Tenn. Crim. App. 1977), and State v. Jack Lee Thomas, No. 03C01-9504-CR-00109, 1995 WL 676396 (Tenn. Crim. App., at Knoxville, Nov. 15, 1995), no perm. to appeal filed, in support of his position. Petitioner argues that because the State did not produce copies of the transcript of the sentencing hearing, there were insufficient facts to support the trial court’s findings that the judgments reflected clerical errors. Petitioner thus contends that a writ of petition for habeas corpus relief is the appropriate remedy.

Pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure, “The court may at any time correct clerical mistakes in judgments . . . and errors in the record arising from oversight or

omission.” Tenn. R. Crim. P. 36. In determining whether there has been a clerical error, this Court has held:

[T]he record in the case must show that the judgment entered omitted a portion of the judgment of the court or that the judgment was erroneously entered. The most reliable indicator that clerical error was made is the transcript of the hearing or other papers filed in connection with the proceedings which show the judgment was not correctly entered. In the absence of these supporting facts, a judgment may not be amended under the clerical error rule after it has become final.

Jack Lee Thomas, Jr., 1995 WL 676396, *1. A panel of this Court reviewed the transcript of Petitioner’s sentencing hearing which was included in the record on direct appeal. Adrian Wilkerson, 1998 WL 538551, at *1, 14-17. According to the opinion, the trial court sentenced Petitioner as a Range I, standard offender, to twenty-five years for his especially aggravated robbery conviction and four years for his theft conviction. Id. Petitioner does not contend that the length of his sentences as reflected in the record on appeal were incorrect. Based on our review, we conclude that there were sufficient supporting facts to support the trial court’s finding that Petitioner’s judgments of conviction for especially aggravated robbery and theft contained clerical errors as to the length of the sentences reflected in the judgment.

Finally, citing McLaney v. Bell, 59 S.W.3d 90 (Tenn. 2001), overruled in part by Summers, 212 S.W.3d at 261-62, Petitioner argues for the first time on appeal that the length of his sentences for especially aggravated robbery and theft are in direct contravention to the applicable statutes, and thus the judgments are illegal and void. The State argues that this issue is waived.

The State acknowledges that the length of Petitioner’s sentences for especially aggravated robbery and theft were erroneously transposed on the judgment forms and that the judgment of conviction for especially aggravated robbery fails to reflect the sentence as modified in this Court’s opinion on appeal. The State asserts, however, that the trial court properly forwarded the judgments of conviction to the Davidson County Criminal Court for correction.

Our supreme court has recently reaffirmed that “[a]s a general rule, a trial judge may correct an illegal, as opposed to a merely erroneous sentence, at any time even if it has become final.” State v. Moody, 160 S.W.3d 512, 516 (Tenn. 2005) (quoting Burkhart, 556 S.W.2d at 873). When it is the defendant who seeks to correct errors which render a judgment illegal, however, the Moody court clarified “that the proper procedure for challenging an illegal sentence at the trial level is through a petition for writ of habeas corpus, the grant or denial of which can then be appealed under the Rules of Appellate Procedure.” Id. at 516 (citing Stephenson v. Carlton, 28 S.W.3d 910, 912 (Tenn. 2000)); see also Jasper D. Lewis v. Cherry Lindamood, No. M2005-02104-CCA-R3-HC, 2006 WL 2563437, at *2 (Tenn. Crim. App., at Nashville, Aug. 31, 2006), no perm. to appeal filed.

Nonetheless, issues that were not presented to the habeas court will not be considered for the first time on appeal. See State v. Turner, 919 S.W.2d 346, 356-57 (Tenn. Crim. App. 1995)

(observing that issues not raised or litigated in the trial court are waived). At this juncture, therefore, and based on the issue presented to the trial court in Petitioner's habeas corpus petition, the trial court did not err in dismissing the petition and finding that the erroneous notations on Petitioner's judgments of conviction for especially aggravated robbery and theft are subject to correction pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure.

We observe that Petitioner appears to misinterpret the breadth of habeas corpus relief under these circumstances. Assuming arguendo, that Petitioner had properly raised the issue of illegality before the trial court and complied with the mandatory procedural requirements, our supreme court has concluded that "where the illegality infects only the sentence, only the sentence is rendered void and habeas corpus relief may be granted to the extent of the sentence only." Smith v. Lewis, 202 S.W.3d 124, 130 (Tenn. 2006). Petitioner's convictions remain intact. Id. When an error in a judgment is in direct contravention of a statute thereby rendering the judgment illegal and void, habeas corpus relief will be granted and the matter remanded to the original court of conviction for the entry of a corrected judgment. See id.

As noted above, however, this is not the posture presented in the case sub judice.

CONCLUSION

Based upon our review of the record, we conclude that the trial court did not err in summarily dismissing Petitioner's habeas corpus petition. The trial court properly directed that the judgments of conviction for especially aggravated robbery and theft be forwarded to the Davidson County Criminal Court for correction to reflect Petitioner's sentence of twenty-one years for his especially aggravated robbery conviction and four years for his theft conviction.

THOMAS T. WOODALL, JUDGE